Greenlinx Sdn Bhd & Anor v Suruhanjaya Syarikat Malaysia

HIGH COURT (KUALA LUMPUR) — PETITION NO D26NCC-39–03 OF 2012
MOHAMAD ARIFF J
14 MAY 2012

Civil Procedure — Parties — Amendment — Oral amendment — Second petitioner's name added to suit — Company struck off register — Application for company's name to be restored — Company counterclaimed against proposed intervener — Whether there will be prejudice

The company was struck off the register and could not therefore be the party to file but the second petitioner as a contributory and director could. The second petitioner was then added. The first petitioner applied to have the name of the company restored to the register by virtue of s 308(5) of the Companies Act 1965. Initially, the proposed intervener in this case claimed for a sum of RM57,489.25. The first petitioner then filed defence and counterclaimed for a sum of RM17,210,128.90. The former's claim was struck out with costs and later appealed at the Court of Appeal. This appeal was allowed and the proposed intervener's claim was reinstated, setting aside the counterclaim. The first petitioner then applied for leave to appeal against the decision at the Federal Court. The respondent decided to strike off the company's name from the register as the company had not been filing its annual returns since 1999. The petitioners averred that it was just to restore the company's name due to the ongoing litigation. The petitioners further argued that the first petitioner's name should be restored so that the company can proceed with the counterclaim.

Held, allowing the appeal:

(1) The issue of joinder of parties in the context of our local law, which was essentially grounded in O 15 r 6 of the Rules of the High Court 1980 was a matter of the court's discretion in the totality of the circumstances. It really depended on the factual matrix before the court. There will be no element of prejudice since the claim was ongoing and had been ordered to be heard before the High Court, by the Court of Appeal. It will be just to restore the name of the company to the register so that it can pursue an ongoing claim (see para 18).

(2) The first petitioner was seeking to appeal against the decision and in fairness, it should be allowed to pursue this course of action. When the claim and counterclaim were filed, the first petitioner had not been struck off the register. To that extent the claim was validly filed and validly

contested as such, the process of litigation should be allowed to follow its normal course in fairness to both parties. It will not be 'just' to allow the proposed intervener to intervene and canvas the argument that it should be allowed to strike out its own claim and the counterclaim because the first petitioner was in law non-existent (see para 19).

[Bahasa Malaysia summary

Syarikat telah dibatalkan daripada pendaftaran dan oleh itu tidak boleh menjadi pihak untuk memfailkan tetapi pempetisyen kedua sebagai penyumbang dan pengarah boleh. Pempetisyen kedua kemudiannya dimasukkan. Pempetisyen pertama memohon untuk nama syarikat dikembalikan kepada pendaftaran berdasarkan s 308(5) Akta Syarikat 1965. Pada mulanya, pencelah yang dicadangkan dalam kes ini menuntut untuk wang sejumlah RM57,489.25. Pempetisyen pertama kemudiannya memfailkan pembelaan dan menuntut balas untuk sejumlah RM17,210,128.90. Tuntutan pencelah yang dicadangkan dibatalkan dengan kos dan kemudiannya merayu kepada Mahkamah Rayuan. Rayuan ini dibenarkan dan tuntutan pencelah yang dicadangkan dikembalikan semula, mengenepikan tuntutan balas. Pempetisyen pertama kemudiannya memohon untuk izin bagi merayu terhadap keputusan Mahkamah Persekutuan. Responden memutuskan untuk membatalkan nama syarikat daripada pendaftaran memandangkan syarikat tidak memfailkan pulangan tahunannya semenjak 1999. Pempetisyen-pempetisyen menegaskan bahawa ia hanya untuk mengembalikan semula nama syarikat akibat daripada litigasi yang sedang berjalan. Pempetisyen-pempetisyen selanjutnya berhujah bahawa nama pempetisyen pertama patut dikembalikan semula supaya syarikat dapat meneruskan dengan tuntutan balas.

Diputuskan, membenarkan rayuan:

(1) Isu percantuman pihak dalam konteks undang-undang tempatan kita, yang mana pada asasnya ditetapkan di dalam A 15 k 6 Kaedah-Kaedah Mahkamah Tinggi 1980 adalah perkara budi bicara mahkamah dalam keseluruhan keadaan. Ia betul-betul bergantung ke atas fakta matriks di hadapan mahkamah. Tidak terdapat unsur prejudis memandangkan tuntutan adalah sedang berjalan dan telah diperintahkan untuk didengar di hadapan Mahkamah Tinggi, oleh Mahkamah Rayuan. Ia hanya untuk mengembalikan semula nama syarikat kepada pendaftaran supaya ia dapat meneruskan dengan tuntutan yang sedang berjalan (lihat perenggan 18).

(2) Pempetisyen pertama memohon untuk merayu terhadap keputusan dan dalam keadilan, ia patut dibenarkan untuk meneruskan dengan tindakan ini. Apabila tuntutan dan tuntutan balas difailkan, pempetisyen pertama tidak dibatalkan daripada pendaftaran. Setakat itu tuntutan tersebut difailkan secara sah dan dipertikaikan secara sah dengan itu, proses

litigasi patut dibenarkan untuk mengikut perjalanan biasa untuk keadilan kepada kedua-dua pihak. Ia bukan 'just' untuk membenarkan pencelah yang dicadangkan untuk mencelah dan untuk meneliti hujahan bahawa ia patut dibenarkan untuk membatalkan tuntutannya sendiri dan tuntutan balas kerana pempetisyen pertama dari segi undang-undang tidak wujud (lihat perenggan 19).]

Notes

For a case on amendment, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) para 5533.

Cases referred to

Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd [2007] SCA 6, SC (refd)

J JK Weeks Constructions Pty Ltd Re (1982) 7 ACLR 102, SC (refd)

Timothy's Pty Ltd and the Companies Act Re (1981) 6 ACLR 823, SC (refd)

Legislation referred to

Companies Act 1965 s 308(4), (5)

Rules of the High Court 1980 O 15 r 6

Raymond Mah (Jason Kung Que Seng with him) (Mah Weng Kwai & Associates) for the petitioners.

Najia bt Abdul Razak (Legal Service Division, Companies Commission of Malaysia) for the respondent.

Tay Hong Huat (Siti Fairuz bt Mohd Ali with him) (Tay & Helen Wong) for the proposed intervener.

Mohamad Ariff J:

[1] The main application in this suit was originally filed by the first petitioner under s 308(5) of the Companies Act 1965 to have the name of the company restored to the register. The name of the company has been struck off the register by the SSM on 25 February 2011 upon the publication of the striking off in the federal *gazette* dated the same day. Pursuant to s 308(4), upon the publication of the notice of the striking off, the company 'shall be dissolved'.

[2] An oral amendment to add the name of the second petitioner was allowed by this court, and that corrected the initial flaw in the application. The company itself, being struck off the register and dissolved, could not therefore be the proper party to file this petition, but the second petitioner as a contributory and director, could.

[3] Section 308(5) allows 'any person who feels aggrieved by the name of the

company having been struck off the register' to make an application at any time within 15 years after the striking off for an order of the court to have the name of the company restored to the register. On its wording, the court 'may' order the restoration of the name of the company to the register if the court is satisfied (a) that the company was, at the time of the striking off, carrying on business or in operation, or (b) 'otherwise that it is just that the name of the company be restored to the register'.

[4] The court is therefore vested with the discretion to order the restoration of the name of the company to the register and in so doing the court 'may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off'. The section also says that upon an office copy of the order being lodged with the SSM, 'the company shall be deemed to have continued in existence as if its name had not been struck off'.

[5] The petitioners have argued that at the time of the striking off of the company's name, the petitioner was pursuing an ongoing claim against another company, Demag (Malaysia) Sdn Bhd ('Demag') for a sum of RM17,210,128.90. This was on a counterclaim. Demag is now before the court in an application to intervene in this proceeding and to argue, should the court allow its application, that the name of the company should not be restored to the register.

[6] This ongoing litigation was originally filed by the proposed intervener on 1 February 2001 against the first petitioner company for the sum of approximately RM57,489.25 together with interest and costs. On 13 September 2001, the first petitioner company filed its defence and counterclaim for the abovesaid sum of approximately RM17,210,128.90. On 25 March 2009, the Shah Alam High Court struck out the proposed intervener's claim with costs, and subsequently on 12 May 2009 the very same court allowed the counterclaim with costs for RM17,210,128.90. There was an application to the judge in chambers from this decision which was also dismissed on 25 February 2010. An appeal was filed by the proposed intervener to the Court of Appeal on 3 March 2010. The proposed intervener's appeal was allowed by the Court of Appeal on 18 January 2012. The Court of Appeal also ordered that the proposed intervener's claim be reinstated and set aside the judgment allowing the counterclaim. Not being satisfied with the decision of the Court of Appeal, the first petitioner company instructed its solicitors to file an application to leave to appeal against the decision to the Federal Court on 18 January 2012.

[7] Looking at the sequence of events, it is clear that as at the date of the filing

of the appeal to the Court of Appeal, the first petitioner company was still on the register. However, as at the date of the Court of Appeal decision it had been struck off the register.

[8] According to the petitioners' counsel, it was only during the course of preparing for the application for leave to appeal that they came to know of the striking off of the name of the company from the register. Apparently the proposed intervener's solicitors had informed them by letter dated 31 January 2012 of this position.

[9] The application for leave to appeal to the Federal Court was filed on 17 February 2012, and in this application the company has disclosed in the notice of motion that it has been struck off the register and has applied for a stay of the application for leave pending a decision on its application to reinstate the company to the register.

[10] I have heard the submissions by the parties in the main application and have considered the views expressed by the SSM that it decided to strike off the company name from the register because the company had not been filing its annual returns for a good number of years, in fact since 1999. I have also considered the arguments raised by the company that it was actually unaware of the notices of intention to deregister it and the relevant gazette notifications. I have particularly considered the argument raised by counsel for the petitioners that it is just to have the name of the company restored to the register because of the ongoing litigation. Shortly put, the petitioners have argued that it is just and equitable for the first petitioner's name to be restored to the register of companies so that the company can proceed with its counterclaim against the proposed intervener.

[11] Several Australian company law authorities have been cited for the proposition that they could be an order for restoration so that the company can continue to pursue an ongoing litigation claim. These cases are *Re J JK Weeks Constructions Pty Ltd* (1982) 7 ACLR 102 (Supreme Court of South Australia) and *Re Timothy's Pty Ltd and the Companies Act* (1981) 6 ACLR 823 (Supreme Court of New South Wales). In *Re Timothy's Pty Ltd and the Companies Act*, the court opined that in such a situation it would be just to order that the name of the company be restored and further the court did not need to determine whether the company was still in operation. The court stated:

> If, after the proceedings … are completed, Timothy's Pty Ltd does not carry on business, no doubt the commission can again strike its name off the register.

[12] I find this reasoning both persuasive and practical in the context of the present factual matrix. Thus, at the last hearing before the proposed intervener

filed its application to intervene, I had already directed that the petitioners file an affidavit to include the unaudited balance sheet and profit and loss accounts for the period 1999–2011 if it was possible to do so, and if not, to exhibit the unaudited balance sheet and profit and loss accounts for the more current years while the company should prepare its full audit of the accounts within nine months from the date of the order which the court may make. This affidavit should also contain a confirmation by the company to pay all fees and compounds to be, or as may be, imposed on it by the SSM. SSM is on record as asking for RM2,000 as costs, and this was suitably noted.

[13] The petitioners have filed this affidavit to comply with the directions of this court, and as far as the immediate parties are concerned, if the requirements directed by this court are complied with, it will follow as a matter of course that this court will allow the application by the petitioners with the costs of RM2,000 to be paid to the SSM. It is only now, at this late juncture, that the proposed intervener has filed the application to intervene. I note from the evidence before this court that the proposed intervener has in fact been informed of the company's intention to file this application for restoration of its name to the register as early as 14 February 2012. The proposed intervener had not seen it fit to enquire further from the company.

[14] The proposed intervener is now arguing that this present action involves the intervener as well and in this context, they will be unfairly prejudiced if the name of the company is restored to the register. As a matter of statutory principle, the point is made, will it be 'just' to restore the company to the register? This issue, it is argued, is not a stand-alone consideration and must be accompanied by another requirement, namely for the court to make 'just' provisions between the company and all other persons to place them 'in the same position as nearly as may be as if the name of the company had not been struck off'. It is argued that there is a concomitant requirement of justice to the proposed intervener as well.

[15] The proposed intervener submits that it will be plainly wrong to say the proposed intervener has no right or interest to be heard. In support of this argument, counsel cites a decision of the Supreme Court of South Africa, namely *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd* [2007] SCA 6 (RSA).

[16] In this Supreme Court of South Africa case, the appellant (*Insamcor*) succeeded in its appeal against the decision of the lower court which ordered a restoration of the respondent company's name to the register. From this premise, it is now argued that even when a company has been restored to the register, the court can still reverse its earlier order on this. I have considered this decision carefully, mindful always of the factual matrix and the applicable law.

On the facts, *Insamcor*'s was a case where the respondent company had been deregistered voluntarily at the behest of its parent company as part of a restructuring to rationalise the activities of the entities in the group. Further, there was a claim for royalties against *Insamcor*'s who had in turn argued the royalty payments were reciprocal upon the performance by the respondent company of its obligations to provide know-how and technical aid, and because of this failure the respondent was not entitled to claim royalties or to cancel the agreement between the parties. It also appears from the report of the case that *Insamcor*'s was not notified of the proceedings for the restoration of the respondent company's name to the register. The application was made, it appears from the report again, because *Insamcor*'s had refused to accept another company known as DFC as its debtor under the agreement. The parent company apparently had attempted to sell the business previously conducted by the respondent company to DFC. To overcome this difficulty, the parent company attempted to reverse the sale of the business back to the respondent by selling the shares in the respondent to DFC instead of its former business. This then led to the application to restore the name of the respondent company. Thus, it was in this context that the Supreme Court of South Africa stated:

> According to s 73(6)(d) [the South African equivalent of s 308 (5)] the court's power to grant a restoration order is introduced by the word 'may'. It follows that the court has discretion to grant the order. It is not bound to do so, even if all the prerequisites imposed by the section are satisfied … One of the considerations the court will inevitably have regard to in exercising that discretion, is the potential prejudice the restoration may cause to third parties …
>
> In the premises it is, in my view, self evident that third parties who will or may be prejudiced by the restoration order must be given the opportunity to persuade the court not to exercise its discretion in favour of a restoration order. Alternatively, they may endeavour to persuade the court to make the order subject to such directions under s 73(6)(b) as may serve to alleviate its prejudicial consequences. The inevitable conclusion I draw from all this is that third parties who will or may suffer prejudice as a result of the restoration order, have a 'direct and substantial interest' in the outcome of the application for such an order. It follows that they should be joined as necessary parties to the application …

[17] I notice as well the observation made by the Supreme Court of South Africa that the practice in the country has been to issue a rule nisi first so that all parties will have a right to object will have an opportunity to do so. Apparently on the facts of *Insamcor*'s, no such rule nisi was issued. This of course is practice peculiar to South Africa; there is no similar practice in Malaysian law.

[18] There is no gain saying that the decisions of the Superior Courts of Commonwealth countries will often provide much-needed jurisprudential

assistance, particularly where there is a dearth of local Malaysian cases on any particular point. But they remain only persuasive, although entitled to a large degree of respect. On the law, I find the statement of the general legal position on the entitlement of third parties to be added or joined as necessary parties attractive and should be similarly applied in the context of s 308(5) of our law, but the issue of joinder of parties in the context of our local law, which is grounded on essentially O 15 r 6 of the Rules of the High Court, is a matter of the court's discretion in the totality of the circumstances. It really ultimately depends on the factual matrix before the court.

[19] Aside from the delay in the application, I also find the grounds in support rather strange. The proposed intervener seeks leave to intervene so as to allow it to argue that it will be unjust to have the name of the first petitioner restored to the register because the proposed intervener has a pending application in the Shah Alam High Court to strike out not only its claim against the first petitioner company but also the first petitioner company's defence and counterclaim against it. This amounts to nothing more than seeking a tactical advantage. I have noted that when the Court of Appeal decided in the proposed intervener's favour and directed that the matter be remitted to the High Court for trial, the first petitioner company had already been struck off the register. The first petitioner is simply seeking a restoration of its name to the register so as to allow this ongoing claim by it and against it. It has filed an application to leave to appeal to the Federal Court and this application is pending. It has been struck off the register not because it has volunteered to be struck off (unlike the case in *Insamcor*), but because the SSM struck off its name for failure to file annual returns since 1999. The company is now willing to have its annual returns prepared and audited for the relevant period within a period of nine months, and the SSM has indicated that it is willing to have the name restored on this basis and upon payment of whatever compounds the company may need to pay for the breaches of the Companies Act. As I have indicated earlier, the very persuasive Australian authorities cited before me do indicate that it will be just to restore the name of the company to the register so that it can pursue an ongoing claim. This point has been fully ventilated before me, and it will serve only as a slight purpose, if at all, for me to allow the application of the proposed intervener in the circumstances. There will be no element of prejudice since the claim is ongoing and has been ordered to be heard before the Shah Alam High Court by the Court of Appeal. The first petitioner is of course seeking to appeal against this decision and in fairness, it should be allowed to pursue this course of action. After all, when the claim and counterclaim were filed the first petitioner had not been struck off the register. To that extent the claim was validly filed and validly contested, and as such the process of litigation should be allowed to follow its normal course in fairness to both parties. I do not believe it will be 'just' to allow the proposed intervener to

intervene and canvas the argument that it should be allowed to strike out the claim (its own claim) and the counterclaim because the first petitioner is in law non-existent.

[20] In the circumstances therefore, and in exercise of this court's discretion based on requirements of s 308(5) of the Companies Act read in conjunction with O 15 r 6 of the Rules of the High Court, the proper order to make is to dismiss the proposed intervener's application with costs RM2,000 to be paid by the proposed intervener/applicant to the petitioners.

[21] Consequently, the petitioners' application to have the name of the first petitioner restored to the register is allowed as prayed in encl 1, para 11, prayers (a)–(b), with a further order that the first petitioner shall file its annual reports and audited financial statements for the period 1999 until 2011 within nine months from the date of this court's order and further that the first petitioner shall pay all or any compounds and/or penalties which may or shall be imposed on it by the SSM and costs of RM2,000 shall be paid by the petitioners to the respondent within 30 days from the date of this order.

Appeal allowed.

Reported by Ibnu Aswan